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No. 78-590

In the Supreme Court of the United States

OCTOBER TERM, 1978

CHARLES BLASCO and DONALD JENNINGS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SAM ADAM
EDWARD M. GENSON
ALAN D. BLUMENTHAL
134 North LaSalle #300
Chicago, Illinois 60602
726-9015
Attorneys for Petitioner JENNINGS

KENNETH CUNNIFF
29 South LaSalle
Chicago, Illinois 60603
782-5140
Attorney for Petitioner BLASCO

Of Counsel:
JEFFREY B. STEINBACK

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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CHARLES BLASCO and DONALD JENNINGS,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Charles Blasco and Donald Jennings pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The unpublished opinion of the Court of Appeals is appended to this Petition as Appendix A.

JURISDICTION

The opinion of the Court of Appeals was entered on August 9, 1978. Petitioners' Petition for Rehearing, timely filed, was denied on September 12, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

QUESTION PRESENTED

Whether the Government is barred by the Double Jeopardy Clause from appealing from a judgment of acquittal entered pursuant to Rule 29(c) (Federal Rules of Criminal Procedure) after a jury verdict of conviction.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

STATEMENT OF THE CASE

Petitioners, Chicago Police Officers, were charged in an eight count indictment as follows: Count I charged both petitioners with misprision of a felony (18 U.S.C. §4) in that they concealed from authorities that Sam Johnson, a/k/a "Fat Sam" possessed heroin; Counts II and III charged petitioners with the same offense in connection with other individuals; Counts IV and V charged Petitioner Jennings with distributing heroin and cocaine; Counts VI and VII charged Petitioners with racketeering (18 U.S.C. §1962) and Count VIII charged Petitioners with conspiring to commit racketeering.

After deliberating two (2) days, the jury notified the court that they were "hopelessly deadlocked" whereupon the court charged the jury pursuant to *United States* v. *Silvern*, 484 F.2d 879 (7 Cir., 1973). Thereafter, the jury returned verdicts acquitting Petitioners of all counts except Count I, upon which single count a verdict of guilty was entered.

Pursuant to Rule 29(c), Federal Rules of Criminal Procedure, Petitioners moved the court to set aside the verdict and enter a judgment of acquittal. The trial judge, the Honorable Frank J. McGarr, granted the motion and the Government sought an appeal pursuant to 18 U.S.C. §3731.

The Seventh Circuit reversed, holding that (a) the Government was not barred by the Double Jeopardy Clause from appealing the acquittal; and (b) Judge McGarr did not have the power to grant the acquittal motion (Appendix B).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals below holding that the Government may appeal from an order that vacating a conviction and acquitting the accused, conflicts with the Double Jeopardy Clause of the Fifth Amendment, Rule 29(c) of the Federal Rules of Criminal Procedure and various decisions of this Honorable Court.

The Fifth Amendment guarantee against Double Jeopardy provides:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

Rule 29(c), Federal Rules of Criminal Procedure, provides:

> "(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."
> As amended Feb. 28, 1966, eff. July 1, 1966.

Mr. Justice Stevens, concurring in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 576, 97 S.Ct. 1349, 1357, 51 L.Ed.2d 642, 654 (1977) succinctly stated Petitioners' position:

> "There is no statutory authority for a government appeal from a judgment of acquittal in a criminal case. The plain language of 18 U.S.C. §3731, together with its unambiguous legislative history, makes it perfectly clear that Congress did not authorize—and did not intend to authorize—appeals from acquittals."

Petitioners have been unable to find a single authority from this Honorable Court authorizing an appeal by the Government once the trial judge has acquitted the accused.

Petitioners, who have been convicted, acquitted and now convicted again of the same offense are truly the victims of what the court resolutely set its face against when it said:

> "[T] State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."
> *Green* v. *United States*, 355 U.S. 184, 187-88 (1957).

Judge McGarr, who listened to all the evidence along with the jury, granted Petitioners' motion for acquittal brought pursuant to Rule 29(c). Notwithstanding this, the Court of Appeals vacated the order of acquittal. In so doing, the Court of Appeals effectively read Rule 29(c) out of existence holding that: "Even if a judge himself feels a witness is unbelievable, this is not a sufficient basis for granting acquittal (because) the trial judge should not take upon himself this power of the jury . . . ." (Appendix A, p. 8).

However, even if Judge McGarr was in error (and we do not concede that he was) the Double Jeopardy Clause bars retrial even where the acquittal "was based upon an

egregiously erroneous foundation." *Fong Foo* v. *United States*, 369 U.S. 141, 143, 82 S.Ct. 671 (1962).

In *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 97 S.Ct. 1349 (1977), a deadlocked jury was discharged and pursuant to Federal Rule of Criminal Procedure 29(c) the court ordered an acquittal. The Government sought to appeal, but this Court denied such a right, holding that no legal distinction exists under Rule 29(c) between judge and jury "with respect to the invocation of the protections of the Double Jeopardy Clause." (97 S.Ct. 1356); nor are "artificial distinctions" as to the timing of the acquittal to be incorporated into the Rule.

> "Rather the differentiations in timing were intentionally incorporated into the Rule to afford a trial judge the maximum opportunity to consider with care a pending acquittal motion."
>
> • • •
>
> "We thus conclude that judgments under Rule 29 are to be treated uniformly and, accordingly, the Double Jeopardy Clause bars appeal from an acquittal entered under 29(c) after a jury mistrial no less than under 29(a) or (b)."
> (97 S.Ct. at 1356).

In *Sanabria* v. *United States*, ... U.S. ....., 98 S.Ct. 2170 (1978), the district judge, after the defendant rested, erroneously excluded certain evidence and then acquitted the defendant because of lack of evidence. The Government appealed and the Court of Appeals vacated the judgment of acquittal. This Honorable Court reversed, holding:

> "The fundamental nature of this rule (against being twice placed in jeopardy) is manifested by its explicit extension to situations where an acquittal is 'based upon an egregiously erroneous foundation.' " [98 S.Ct. at 2178, quoting Fong Foo v. United States, 369 U.S. 141 at 143.]
>
> • • •
>
> "Thus when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous (98 S.Ct. at 2179)."
>
> • • •
>
> "That judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." (98 S.Ct. at 2181).
>
> • • •
>
> ". . . . there is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous,' (citation) the legal rulings leading to that judgment might be." (98 S.Ct. at 2184).

If the conclusion of the court of appeals in the instant cause is correct then, in the light of *Sanabria*, an acquittal directed *at any time* prior to a jury verdict is insulated from Government appeal by the Double Jeopardy clause, but an acquittal after conviction is not, thus making "the issue of double jeopardy turn very largely on temporal considerations. . . ." *Lee* v. *United States*, 432 U.S. 23, 36, 97 S.Ct. 2141, 2149, 53 L.Ed. 2d 80 (1977) (Rehnquist, J., concurring)—truly the "artificial distinction" adumbrated by this court in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564.

The instant cause is the reverse side of the jeopardy coin recently scrutinized in *Burks* v. *United States*, ... U.S. ....., 98 S.Ct. 2141 (1978) wherein this court held that where a court of review determines that the evidence is insufficient to sustain a conviction the Double Jeopardy

Clause precludes retrial. Certainly, the same rule applies when that determination is made by the district judge.

See also, *Green* v. *Massey*, ... U.S. ....., 98 S.Ct. 2151 (1978).

There is not one word in the legislative history of Rule 29(c) which indicates that Congress intended to deprive the district judges of their inherent power to set aside a conviction and order an acquittal; or that Congress intended that the Government had the right to appeal from such order; or that the Constitutional guarantee against double jeopardy should depend upon the slender reed of the precise timing of the acquittal.

CONCLUSION

For all the foregoing reasons the Petition for Writ of Certiorari should be allowed to review the instant decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

SAM ADAM
EDWARD M. GENSON
ALAN D. BLUMENTHAL
KENNETH CUNNIFF

Of Counsel:
JEFFREY B. STEINBACK

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-2027

UNITED STATES OF AMERICA,

Plaintiff-Appellant.

v.

CHARLES BLASCO and DONALD JENNINGS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 CR 1001—Frank J. McGarr, *Judge.*

Argued April 14, 1978—Decided August 9, 1978

Before PELL, TONE and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* Defendants-appellants, Chicago police officers Blasco and Jennings, were charged in an eight count indictment with engaging in a pattern of solicitation and acceptance of bribes from narcotics dealers. Count I charged both officers with the misprision of a felony, under 18 U.S.C. § 4, in that they concealed from

authorities that Sam Johnson, a/k/a "Fat Sam," possessed heroin for distribution. Count II charged both officers and Count III charged only Jennings with the same offense in connection with other individuals. Counts IV and V charged Jennings with knowing and intentional distribution of heroin and cocaine. Count VI charged Blasco and Count VII charged Jennings with racketeering activity, in violation of 18 U.S.C. § 1962, for soliciting and receiving bribes and distributing drugs. Count VII charged both officers with conspiring, along with other unindicted co-conspirators, to violate the racketeering provisions.

During the three-week trial the government presented this version of the events to the jury: During 1973-74 the defendants were assigned to the Tactical Unit of the 7th District of the Chicago Police Department. Their duties included investigating and arresting narcotics offenders in this district. During approximately six months of this period, Whitelaw Abrams worked as an informant for the defendants. Abrams was familiar with the narcotics trafficking in the district and was himself a heroin addict. Based on information supplied by Abrams, the defendants were able to stop numerous narcotics offenders. On most of these occasions, the defendants would accept money and/or narcotics in return for releasing these offenders without formally arresting and charging them. The defendants would reward Abrams with money and/or narcotics for the information provided by him. Witness Abrams testified naming the narcotics dealers, including Sam Johnson, who had paid bribes to the officers. Testifying in the government's case were past and present drug addicts and persons of varied criminal backgrounds. The defendants testified in their own behalf denying their guilt, as well as calling approximately fifty witnesses to testify to their good character and reputation.

Following two days of deliberation the jury foreman notified the judge that they were "hopelessly deadlocked." The jury was brought back into court and given the charge recommended by this court in *United States* v. *Silvern*, 484 F.2d 879 (7th Cir. 1973). The jury deliberated a few hours thereafter and returned a verdict of guilty as to both defendants on Count I and a verdict of not guilty as to both defendants on the remaining counts. After the court entered judgment on the verdicts, both defendants moved for a judgment of acquittal on Count I notwithstanding the verdict. The court entered a judgment of acquittal on Count I, giving as the reason for its action that the evidence on Count I was neither more credible nor more probative than the evidence on the other counts.

I.

The government seeks to appeal pursuant to 18 U.S.C. §3731.[1] The defendants argue that the Double Jeopardy clause's aim of protecting the integrity of a final judgment renders the judgment entered in this case binding and non-reviewable, and asks that the appeal be dismissed.

It has long been the rule that the government cannot appeal in a criminal case without express congressional authorization. In *United States* v. *Wilson*, 420 U.S. 332 (1975), the Supreme Court traced the uneven course of the statutory authority until 1970 when Congress amended the Criminal Appeals Act, and found that when Congress

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[1] 18 U.S.C. § 3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

enacted § 3731, it "intended to remove all statutory barriers to Government appeals whenever the Constitution would permit." 420 U.S. at 337. Therefore, unless barred by the Double Jeopardy clause, the appeal here by the government from the judgment of acquittal is authorized by § 3731.

The Seventh Circuit [2] only recently in *United States* v. *Allison*, 555 F.2d 1385 (7th Cir. 1977), held that the government may appeal from a judgment of acquittal "where a reversal would not require a retrial or any further proceedings before the entry of a judgment." *Id.* at 1387. We feel the correctness of our decision in *Allison* has been reaffirmed by the recent pronouncements of the Supreme Court on 18 U.S.C. § 3731 and the Double Jeopardy clause. See generally, *Burke* v. *United States*, ... U.S. ....., 46 U.S.L.W. 4632 (1978); *Sanabria* v. *United States*, ... U.S. ....., 46 U.S.L.W. 4646 (1978); *United States* v. *Scott*, ... U.S. ....., 46 U.S.L.W. 4653 (1978); and *United States* v. *Ceccolini*, ... U.S. ....., 46 U.S.L.W. 4230 (1978).

In *Wilson, supra*, later in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568-69, and now just recently in *United States* v. *Scott, supra* at 4654, the Court has stated that the "Double Jeopardy clause is primarily 'directed at the threat of multiple prosecution,' and pose[s] no bar to Government appeal 'where those appeals would not require a new trial.'" The Court in *Scott*, while overruling its decision in *United States* v. *Jenkins*, 420 U.S. 358 (1975),

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[2] Six other circuits have reached the same result we did in the *Allison* decision:

United States v. *Calloway*, 562 F.2d 615 (10th Cir. 1977);
United States v. *Cahalane*, 560 F.2d 601 (3rd Cir. 1977);
United States v. *Rajas*, 554 F.2d 938 (9th Cir. 1977);
United States v. *Donahue*, 539 F.2d 1131 (8th Cir. 1976);
United States v. *Burroughs*, 537 F.2d 1156 (4th Cir. 1976);
United States v. *DeGarces*, 518 F.2d 1156 (2d Cir. 1975).

See also United States v. *Scott*, 46 U.S.L.W. at 4655, n.7.

makes clear that the assumption which the government relies on here from *Jenkins*, "a judgment of acquittal [can] be appealed where no retrial would be needed on remand," has not been repudiated.[3] *Scott, supra* at 4655, n. 7.

In conclusion we add that we find no support in either *Wilson, supra*, or the recent cases from the Supreme Court cited above, for the contention that while the government may have the right to appeal where the judge's ruling is based on "purely legal considerations," here the ruling was on "solely evidentiary factual considerations"[4] and the government therefore has no right of appeal. The Supreme Court has indicated that the focus of the inquiry in seeking to determine whether the government has the right to appeal where the ruling favorable to the defendant has occurred after a contrary determination by the finder of fact is whether there is any need, if reversed, for further factual findings, i.e., the protection from "multiple prosecutions" purpose of the Double Jeopardy clause. Even the Justices dissenting in *Scott*, while disagreeing with the majority's definition of "acquittal,"[5] note that the gov-

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[3] The Court in *Scott* held that the Double Jeopardy clause does not preclude appeal by the government even where further proceedings are necessary if the ruling is reversed, when the trial judge terminated the proceedings favorable to the defendant, on the defendant's motion, before any determination of factual guilt or innocence. 46 U.S.L.W. at 4657-58

[4] Whether the termination of the proceedings is based on a factual determination of guilt or innocence can be a critical factor in other situations. See *United States* v. *Scott, supra*, at 4655.

[5] Justices Brennan, White, Marshall and Stevens disapproved of the majority's "new restrictive" definition of a "true acquittal," i.e., "when the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not of some or all of the factual elements of the offense charged" and its attempt to distinguish such rulings from "other final judgments favorable to the accused." 46 U.S.L.W. at 4659.

ernment is allowed to appeal, under *Wilson*, "whether or not the final judgment was an acquittal . . . if reversal would not necessitate a retrial." *Scott, supra* at 4659.

We conclude, therefore, that the government's right to appeal under 18 U.S.C. § 3731 depends in the present case upon whether further proceedings upon reversal would be necessary. Inasmuch as the jury returned a guilty verdict against both defendants on Count I, the ruling by the trial judge acquitting both defendants on Count I can be acted upon by this court without subjecting them to a second trial. If the defendant prevails on appeal, the matter will become final. If the defendants lose, the case will go back to the district court for reinstatement of the verdict and for disposition of any remaining motions. Accordingly, we conclude that the Double Jeopardy clause poses no bar in this case and this court has jurisdiction to entertain the appeal of the government.

II.

In the Memorandum Order granting defendants' motion for acquittal, the district court gave the following reasons for its action:

> The assessment of the credibility of the government witnesses, most of whom were persons with criminal backgrounds and past or present drug addicts, was clearly a central issue in this case. It is the opinion of this court that the evidence supportive of the allegations in the only count on which the defendants were found guilty, was neither more nor less probative, nor more nor less credible than the evidence supporting the other counts.

To the extent this statement can be interpreted as indicating that the court based its decision on its own assess-

ment of the credibility of the government witnesses who testified to the incident charged in Count I, the court erred. The rule has long been established that when ruling on a motion for acquittal the test that the court must use is

> whether at the time of the motion there was relevant evidence from which the jury could reasonably find [the defendant] guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the Government . . . bear[ing] in mind that "it is the exclusive function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences" . . . . (citations omitted.)

United States v. *Rojas*, 554 F.2d 938, 943 (9th Cir. 1977). Our review of the record as to Count I indicates that there was sufficient evidence to convict both the defendants of this charge, if the jury chose to believe the testimony of witnesses, Sam Johnson, Whitelaw Abrams and Gloria de Savieu.[6] The jury was properly instructed as to its role in

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[6] The charge in Count I resulted from a "raid" made by the two officers and Abrams, based on information received from Abrams that Sam Johnson sold him heroin just moments before. After breaking into the house with a sledge hammer, they apprehended a number of individuals inside, including Gloria de Savieu and Sam Johnson. According to the government's witnesses a conversation followed between the officers, Abrams and Johnson both in the house, and later in the car as to how much money Johnson would have to pay in order to avoid being arrested for possession and distribution of heroin. The officers and Abrams reportedly received approximately $1,000 from Sam Johnson. He was not arrested. The witnesses identified the defendants as the participants in this incident, that Sam Johnson had committed the offense of distributing heroin, that the officers were aware of the offense, and rather than reporting it concealed it in exchange for the payment of a bribe, thereby establishing the essential elements of the crime.

assessing the credibility of witnesses. Under these circumstances even if a judge himself feels a witness is unbelievable, this is not a sufficient basis for granting acquittal.[7] The trial judge should not take upon himself this power of the jury, for "[u]nder our system of jurisprudence a properly instructed jury of citizens decides whether witnesses are credible. The trial judge is deemed to have no special expertise in determining who speaks the truth." (citations and footnote omitted.) *United States* v. *Cravero,* 530 F.2d 666, 670 (5th Cir. 1976).

To the extent the statement by the district court can be interpreted as saying that the jury returned inconsistent verdicts, we disagree. As we have already indicated our review of the record indicates that there was sufficient evidence to support each of the elements of the crime of misprision of a felony. In contrast, as the government points out, its proof as to the other counts of the indictment lacked the same quality and quantity as the evidence in Count I.[8] Particularly we note that the crime charged in Count I was testified to by three witnesses, providing corroboration as to some of the essential elements of the charge. On no other count was there corroboration. However, even if we were to view the verdicts as inconsistent, this fact

[7] We note that the testimony of the witnesses was not incredible on its face, and thus cannot be said to be incredible as a matter of law. See *United States* v. *Cravero,* 530 F.2d at 670.

[8] The defendants attach importance to the fact that while the jury found the men guilty of Count I, they were found not guilty on the racketeering counts, and the incident involving "Fat Sam" was part of both counts. However, the law is, and the jury was instructed, that to convict on the racketeering counts, they had to be satisfied that at least *two* of the incidents occurred. Accordingly, the verdicts on the different counts are not necessarily inconsistent.

alone cannot serve as the basis for granting an acquittal. *United States* v. *Reicin,* 497 F.2d 563, 567 (7th Cir. 1974).[9] This is especially true in this case since the purported inconsistency may simply be that the jury believed the government witnesses in certain aspects of their testimony and disbelieved them in others. The jury was instructed that it was entitled to do just that.[10]

For the foregoing reasons, the ruling of the district court entering a judgment of acquittal as to both defendants on Count I is reversed and the case is remanded with instructions to reinstate the jury's verdict.

REVERSED.

A true copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

[9] There we had occasion to note in response to a similar allegation that "the defendant fails to take into account the possibility that the jury might have been exercising 'its historic power of lenity' . . . convict[ing] on some counts but acquit[ting] on others, not because they are unconvinced of guilt, but simply because of compassion or compromise." 497 F.2d at 567.

[10] The jury was instructed that they "may disregard testimony in whole or in part [of a witness they believed to have sworn falsely to a material fact in the case] except insofar as it may have been corroborated by other credible evidence."

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 12, 1978.

Before
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Philip W. Tone, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 77-2027 vs.

CHARLES BLASCO and DONALD JENNINGS,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 76 CR 1001

Frank J. McGarr, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.